United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Further, for the proper administration of justice

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P/S

76-1030

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

SIMON BRACH,

Appellant.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

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: Docket No. 76-1030
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PETITION FOR REHEARING AND
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A. Misplaced Reliance Upon The Holding In United States v. Astolas

The principal issues on this appeal are based on the interpretation and application of the foreign commerce jurisdictional requirements of 18 U.S.C. §659. In denying the appellant's motion for judgment of acquittal, the trial judge, the Hon. John R. Bartels, stated: (App. 157a)

> "... I don't say that this is going to be the final answer. In the Court of Appeals you may be successful because I will say this is not a black and white case. It is a close case and the decision of the Court of Appeals might be directly contrary to my decision" (emphasis added)

Notwithstanding the foregoing recognition of the subtle complexities of the facts herein, this Court unanimously affirmed appellant's judgment of conviction from the bench on April 1, 1976. Appellant brings this petition for rehearing in the belief that this Court decided the foreign commerce and related issues without giving due considerations to the

distinctions between its decision in United States v. Astolas, 487 F. 2d 275 (2nd Cir. 1973), cert. den., 416 U.S. 938 (1974) and the instant case.

We respectfully submit that this Court's summary affirmance herein has all but eliminated the demarcation lines between federal and state jurisdiction in numerous larceny cases. Further, by applying Astolas to the instant facts, this Court has transcended the sensitive federal balance which the Supreme Court has sought to maintain and has altered federal - state relationships in such a way as to bring a whole new category of thefts within the purview of federal jurisdiction. See United States v. Bass, 404 U.S. 336 (1971), Rewis v. United States, 401 U.S. 808 (1971).

This case involves the theft of stereo car radios which arrived at a Brooklyn pier after being shipped from Japan. The goods were cleared through Customs by a customs broker and the consignee (Fried Trading Co.) sent its own truck (driven by an employee of Fried) to the pier to pick up the goods. Mr. Follman, the truck driver, went to the pier, hired someone at the pier to assist him in loading the shipment onto the Fried truck and cleared the goods through the Customs process* (App. 39a - 44a). Thereafter, Mr. Follman left the pier, stopped for coffee, made a phone call and drove to the Fried place of business, which included offices and a warehouse. Upon returning

* At the trial Mr. Follman testified that Customs signed a release for the goods at the pier (App. 43a).

unloaded two cartons, closed the truck door and put the cartons into an elevator. He then returned to the truck to "back it in" to the loading dock on the premises of the consignee. (App. 47a - 49a.) Mr. Follman also testified that prior to going back to the truck he was "waiting for instructions" since " He ... (one of the Fried's) ... might tell me to take (sic) the truck, deliver someplace else. He might. I never know what he is going to do with it." (App. 52a.) It was at this point in time and place that the truck was missing and the theft occurred.

In Astolas three (3) tractor - trailors (two outbound and one inbound) and their contents were stolen from a parking lot of a wholesaler which acted as its own interstate trucker. The doors of the two outbound trucks were sealed "with serially numbered metalstrips." 487 F. 2d at 277. Bills of lading for the outbound shipments were placed in the trucks. As to the outbound shipments,

> " ... nothing else had to be done to ready the vehicles for transit; they were merely awaiting their assigned drivers."487 F. 2d at 277.

With respect to the inbound truck no one from the wholesaler had taken possession yet since the driver had arrived after closing hours and left the truck in front of the door to the warehouse and put the bill of lading into a mailbox.

It is respectfully submitted that this Court's holding in Astolas is not dispositive of the issues presented in this case. In basing its summary affirmance upon that assumption, this Court

some factual differences between the two cases. The legal issue which confronted the Astolas court arose out of the fact that the owner (consignee) was also the interstate shipper. The Court was therefore required to determine the fine point when the instrastate shipment phase of the owner (consignee)-shipper's movement began and ended during a continuous period of possession by him. The facts in the instant case contrast sharply. The consignee was not the foreign shipper. It merely picked the goods up from the pier where they had been delivered by the foreign shipper, for intrastate transfer to the consigneds warehouse.

The factual difference is significant because in the instant case, unlike Astolas, delivery from foreign commerce carrier to consignee is readily definable at the point where the consignee exercised complete dominion and control over the goods at the pier. No similar fact existed in Astolas. Accordingly, Astolas is not controlling and this Court's unexplained total reliance upon the holding in Astolas is misplaced.

Instead, what is required her is that this Court face the factual issues which distinguis this case from Astolas and rule upon the question, not controlled by the Astolas holding: whether the receipt by a consignee which is not also the interstate or foreign carrier, of goods delivered to it for transfer intrastate to its warehouse terminates the foreign commerce character of the shipment for purposes of federal jurisdiction under 18 U.S.C. §659. The decisive factors found to be controlling

in Astolas, namely the parking and sealing of the trucks and preparation and placement of bills of lading (all of which factors were decisive on the question when the interstate commerce phase began during a continuous period of ownership by a single entity) are simply not relevant to the issues of this case.

As appellant has pointed out previously in its brief, the instant case is more closely analogous to O'Kelly v. United States, 116 F.2d 966 (8th Cir. 1941) although we contend the facts herein are even stronger than those in O'Kelly. See also Shaver v. United States, 174 F.2d 618 (9th Cir. 1949). In O'Kelly a railroad car on a shippers spur track had been unsealed, some of its contents removed by the consignee and then locked by the consignee with its own padlock before the theft. The present case is more compelling since the shipper no longer had any connection with the goods and the consignee (Fried) had taken full possession, custody and control of the goods. Similarly, see United States v. Burton, 475 F.2d 469 (8th Cir. 1975), where the Court held that delivery of baggage to an airline agent at the airport initiated interstate commerce and it continued "until it reaches the consignee". 475 F.2d at 472.

B. Removal Of The Fact Issue From The Jury

The second major issue on this appeal is whether the trial judge erred in giving jury instructions on the foreign commerce issue which, we suggest, were tantamount to directing

a verdict of guilt. It is axiomatic that in a criminal case a judge may not direct a guilty verdict, United Brotherhood of Carpenters and Joiners of America, 330 U.S. 395 (1946), nor may a court direct the jury to find a controverted fact against a defendant. Konda v. United States, 166 F.91 (7th Cir. 1908), United States England, 347 F.2d 425 (7th Cir. 1965).

It has never been disputed by the parties that the issue of foreign or interstate commerce in a prosecution under 18 U.S.C. §659 is an issue of fact (See United States v. Gollin, 166 F.2d 123 (3rd Cir. 1948)), just as it is in a prosecution under 18 U.S.C. §2313. See Schwachter v. United States, 237 F.2d 640 (6th Cir. 1956); United States v. Briddle, 430 F.2d 1335 (8th Cir. 1970); Powell v. United States, 410 F.2d 710 (5th Cir. 1969). As the Courts have held, the issue whether an automobile is in commerce at the time of its sale under 18 U.S.C. §2313 is:

> "... a question of fact under the surrounding circumstances in each particular case. Schwachter v. United States, supra, 237 F.2d at 644

As all of the cases hold, the point when an item loses its character as interstate commerce after moving between states is a jury question whichstands or falls based upon the facts and circumstances of each case.

As the record reveals, appellant was precluded from developing this fact by arguing that exercise of dominion and control over the goods by the consignee at the time of pick-up

from the pier constituted delivery and consequently served to negate the requisite fact that the goods were stolen while still moving as a part of foreign commerce. There is no reason why this fact issue should be treated differently in the instant case than it would be in prosecution under 18 U.S.C. §2313. By not addressing this issue directly and by ruling summarily that Astolas controls the issue on this appeal, this Court's ruling fails to explain the apparent inconsistency between the scope of the jury's restricted latitude on the foreign or interstate commerce issue in this case and the permissive latitude in the line of cases under 18 U.S.C. §2313.

The Court's rulings in the instant case on the scope of the fact issue was tantamount to the direction of a verdict of guilt.

The trial judge denied appellant's counsel the right to argue to the jury that the Fried Trading Company had acquired control over the goods and that delivery had been completed, even though there were substantial facts to support this conclusion.

The Court: "... there are some cases where facts are so outstanding, that a jury has no right to change them" (App. 176a)

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and

The Court: "... if they reach a conclusion, they reach a conclusion that this was a delivery, I would have to set it aside because there is no evidence." (App. 177a)

Although the Court continued to say it would charge that the jury "may" find that the shipment was part of a foreign shipment (App. 176a - 180a), the court continued to deny counsel the opportunity to argue any alternate theory to the jury based on facts showing completed delivery (App. 180a - 181a).

Mr. Youtt: "... if its 'may' then I must be able to argue something...

The Court: "That doesn't follow at all because I never instructed the jury what they must do. Because ...

Mr. Youtt: "They have no alternative.

The Court: "I might as well direct a verdict of guilty.

Mr. Youtt: "When we get to this point and I can't argue anything to the contrary ...

The Court: "I can't argue on that ... You are not going to get two bites at the cherry by getting the jury to decide as a matter of law whether or not there is a law. I find, if they can find beyond a reasonable doubt what has happened here, as I have indicated it, it is my opinion that they <u>may</u> find that this shipment remained in foreign commerce at the time of the

theft. You say, well, if I don't say they must find it, then that gives you room for argument. No. I don't believe that necessarily follows because they may not find in that -- in actuality that it remained in foreign commerce, but I don't believe that there is any argument that you have suggested which would be anything else but a legal argument to present to the jury." (emphasis added)

After some further discussion concerning proposed arguments to the jury in which even the Government admitted that "Just saying dominion and control, they're going to be left wondering what does that mean " (App. 182a,, the following colloquy took place:

The Court: " ... What do you want to argue?

Mr. Youtt: " I want to start ...

The Court: "You want to get him off although he admitted he stole the truck, period. Isn't that it?

Mr. Youtt: "It happens, Your Honor, in the case where federal jurisdiction ... it happened in the Bell case, in the possession of a weapon.

The Court: " We are not going to be hampered by too many technicalities.

Mr. Youtt: "I say that dominion and control are total possession, evidence of that, starts at the point when the driver directs the loading of that particular shipment at the pier.

The Court: "No.

Mr. Youtt: "And continues when the driver stops for a cup of coffee and continues on ...

The Court: "No. I will say, as a matter of law, that is not so. If they so found it, I would set it aside, if I could. I don't think I could because double jeopardy would prevent it and I will not have that. The answer to that is no. Because it is not so.

Mr. Youtt: "I have no other way to argue.

The Court: "Then you won't be able to do anything about it except appeal to the Court of Appeals and have me reversed." (App. 183a-184a.)

Finally, the Court allowed appellant's counsel to argue one fact to the jury, to wit -- that removal of two cartons from the truck was an indicia of delivery, dominion and control. (App.185a). Other than that, counsel could not argue the foreign commerce question at all.

Although the Court ultimately charged, inconsistently and confusingly, that the jury "may" find that the shipment was no longer in foreign commerce (See Appellant's Brief, at 36-39) it was basically meaningless since counsel had not been able to develop any real alternatives. Even with these limitations on argument, the jury returned with one question, which was:

> "Someone not sure whether it is a Federal case or not. Please explain." (App. 256a.)

The Court then virtually concluded the question for the jury by reciting all of the facts tending to show <u>incomplete delivery</u> which counsel had not been allowed to argue and dispute previously. (App. 257a - 259a). At that point Juror number 3 stated: "I understand it and I do not understand it, to be very honest."

Shortly after this discussion with the jury, the guilty verdict was returned.*

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* It should be noted that the court's handling of the charge in the later trial of the co-defendant, Itshak Bikel, on January 21, 1976, reflects a subtle change in the court's position. There, in response to the jury's question as to what constitutes dominion, the court instructed that dominion merely means

> "... that the consignee had now complete possession of his shipment in the sense that he was able at that moment to physically dispose of it or transfer as well.
>
> * * *
>
> You determine when this truck was double-parked out there for that five minutes, whether he had control and possession and dominion of it, so that he could dispose of it and transfer it immediately himself. It doesn't mean legal ownership. It means possession and power at that time, at that moment. The timing is important." (Charge to Jury in United States v. Itshak Bikel, 75 CR 782 (January 21, 1976)).

It is significant to note that not long after this explanation was given the jury returned its verdict of not guilty for the co-defendant.

The foregoing bar to argument and the charge constituted in effect a directed verdict on the foreign commerce issue. Even though the Court used the word "may" instead of "must" it was a meaningless gesture. Since counsel was never allowed to explore or develop the alternatives to incomplete delivery, the jury was not given the opportunity to understand why Fried Trading Company could have dominion and control of the goods. Further, the charge by the Court so emphasized the facts indicating incomplete delivery that the jury was forced to decide this issue against appellant. If there remains any doubt on the importance of the handling of this problem, the questions from the jury and the confusion of juror number 3 should resolve that. If counsel had a proper opportunity to argue this matter it is probable that no conviction would have resulted. Because the Court, in relying exclusively upon the holding in Astolas, did not come to grips with this issue, a rehearing should be granted at this time. Because the issue is important to the proper relegation of fact finding functions to juries in this circuit, the matter should be considered in banc.

CONCLUSION

We suggest that this case be reheard in banc in view of the importance of the application of the interstate and foreign commerce doctrines of Astolas to cases, such as the instant one, which are actually beyond the scope of federal jurisdiction and should, under the Supreme Court's balancing doctrine, remain within the provice of the States.

Further, for the proper administration of justice and the guidance of the courts in this circuit in §659 cases, we believe, rehearing in banc is also appropriate on the question of whether and to what extent the trial judge may remove the question of jurisdiction from the jury.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Albert Parsons, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 1219 Bergen Street, Brooklyn, New York.
That on April 14, 1976, he served 3 copies of Petition for Rehearing and Suggestion for Rehearing in Banc on

Richard W. Appleby, Esq.,
Assistant United States Attorney
United States Attorney's Office
225 Cadman Plaza East
Brooklyn, New York 11201

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

ALBERT PARSONS

Sworn to before me this
14th day of April, 1976

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1977